

SOUTHERN ENVIRONMENTAL LAW CENTER

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June 7, 2017

VIA FOIA Online

Freedom of Information Act Office
United States Environmental Protection Agency, Headquarters
1200 Pennsylvania Ave NW, Washington, DC 20004

Re: Freedom of Information Act Request and Fee Waiver Request re: Any Comparisons of the “Scalia test” and the “Kennedy test” under the Clean Water Act.

To the FOIA Officer:

This is a request for records in the custody of the United States Army Corps of Engineers (“Corps”) submitted by the Southern Environmental Law Center (“SELC”). SELC is a non-profit, public-interest organization which advocates for, and represents other organizations that also advocate for, among other things, adequate implementation of and compliance with the Clean Water Act (“CWA”) by federal agencies.

A. Request for Records

In 2006 the U.S. Supreme Court decided Rapanos v. United States, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). In this decision the U.S. Supreme Court established two tests of what constitutes a “water of the United States” under the CWA – the “Scalia test” and the “Kennedy test.” In many respects the “Kennedy test” has a broader scope than the “Scalia test,” that is, if one were to apply the “Kennedy test” one would categorize more waters as “waters of the United States” than one would under the “Scalia test.” In certain situations, the reverse would be true. Currently, both tests are being applied to identify waters of the United States. The Trump administration is poised to conduct a rulemaking that would limit waters of the United States determinations to the Scalia test.

Under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, please provide all records relating to any preliminary or final studies, analyses, reports, or inquiries that the Corps has performed, commissioned, or collected that compare:

1) the Scalia test and the Kennedy test to determine the waters of the United States that would be identified under both tests;

2) a Scalia-only test to the current test that applies both the Scalia and Kennedy tests to determine waters of the United States; and

3) a Scalia-only test to the Clean Water Rule test, which relies primarily on the Kennedy test.

Such comparisons could be based on the stream miles or wetlands acreage or percentages of each type of waters protected under these different tests. Whether the comparisons are based on a watershed basis or a nationwide basis, we request that they be provided.

This request is limited to records created, communicated, or received between the dates of June 19, 2006, the date the U.S. Supreme Court decided U.S. v. Rapanos, and the present.

This request is further limited to records in the custody of any officer or employee of the Headquarters Office of the Corps, or any contractor thereof. The records we request could possibly be located in the following offices at U.S. Army Corps of Engineers, Headquarters, without limitation:

- General Counsel's Office
- Office of Water and Wetlands

As used above, the term "records" includes, without limitation, all communications, correspondence, records of phone conversations, transcripts of testimony, minutes or notes of meetings, electronic mail, PowerPoint or other similar presentations, memoranda, reports, maps, photographs, drawings, data, tables, spreadsheets, formulas, notes, observations, impressions, contracts, and policies or directives, whether in an electronic or print medium, original or copy, or draft or final form.

If records (or any portions thereof) are determined to be exempt for any reason, please provide any segregable material and indicate how much material has been withheld and on what grounds. 5 U.S.C. § 552(b); 7 C.F.R. § 1.7.

To the extent that the requested records are maintained in a common electronic format, we request that they be provided in that format.

B. Fee Waiver Request

We also request a fee waiver in connection with this request for records. Fee waivers are to be granted whenever disclosure would serve the public interest (as opposed to a commercial interest) and would contribute significantly to public understanding of government operations or activities. Here, the request would serve no commercial interest. SELC, a non-profit public

interest organization, lacks any commercial interest in the records, and none of its clients have any such interest. SELC is dedicated to using the power of the law to protect clean air, clean water, and special places throughout the six Southeastern states in which we work: Alabama, Tennessee, Georgia, South Carolina, North Carolina, and Virginia. SELC does not charge its clients for legal advice or representation; instead, SELC provides such advice and representation free of charge within the scope of its mission.

We seek these records in order to inform the public about how the Scalia test and Kennedy test differ in identifying waters of the United States and how fewer waters might be identified under the Scalia test. Disclosure of records responsive to this request will aid the public's understanding of how a rulemaking that relies on the Scalia test alone would affect waters of United States determinations. SELC has extensive experience in reviewing, understanding, synthesizing, and communicating information relating to the Clean Water Act in our Southeastern states, furthering public understanding and dialogue.¹

Further, this enhanced understanding will accrue to a significant segment of the public. In addition to making information available on our website to anyone searching for it,² SELC also actively distributes information to the public through newsletters and other publications.³ SELC also disseminates information about issues related to CWA by participating in meetings and conferences. Further, SELC coordinates with a diverse collection of partner organizations actively working to participate in CWA processes. Each of these partners has its own base of supporters to which it will disseminate the information disclosed pursuant to this request. SELC's and its partners' supporters are directly affected by decisions made by federal agencies through the CWA permit process. As a result, responsive information about any Scalia and Kennedy test comparisons will be shared with a substantial portion of the public, and, specifically, a portion of the public affected by and involved with participation in CWA processes.

In reviewing this information and distilling it for the public, SELC's legal expertise will enable it to explain to the public the likely impacts of the Trump Administration's policies and priorities regarding any rulemaking it conducts relating to waters of the United States determinations.

¹ See <http://www.southernenvironment.org/news-and-press/in-the-news> for current examples of media coverage informed by information disseminated by SELC.

² For examples relevant to federal agencies and CWA, please visit SELC's website at <https://www.southernenvironment.org/news-and-press/news-feed/federal-agency-fails-to-assess-need-for-pipeline-and-its-environmental-impacts>; <https://www.southernenvironment.org/news-and-press/news-feed/epa-refutes-tva-claim-that-cap-in-place-coal-ash-plans-have-federal-blessing>; <https://www.southernenvironment.org/news-and-press/news-feed/tva-doubles-down-on-coal-ash-cover-up-plan-despite-growing-public-concern>.

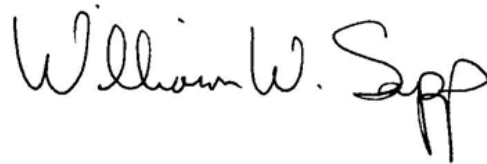
³ To see some recent examples, please visit <http://www.southernenvironment.org/news-and-press/publications>.

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If this request for a fee waiver is denied, please notify us promptly and provide an estimate of the fees associated with the request. If you require any further information or documentation, please do not hesitate to contact us. Thank you for your prompt attention to this request.

Sincerely,

A handwritten signature in black ink that reads "William W. Sapp". The signature is written in a cursive style with a large, stylized 'W' and 'S'.

William W. Sapp
Senior Attorney